

KATHLEEN HOWE)	
Claimant)	
)	
VS.)	
)	
USD 263)	
Respondent)	Docket No. 1,037,749
)	
AND)	
)	
MIDWESTERN INDEMNITY CO.)	
Insurance Carrier)	

Respondent and its insurance carrier (respondent) request review of the January 10, 2008 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

The Administrative Law Judge (ALJ) found that the claimant was injured out of and in the course of her employment with respondent on November 12, 2007 and therefore entitled to temporary total disability (TTD) benefits and medical treatment.

The respondent requests review of this decision alleging that the greater weight of the credible evidence establishes that claimant's present complaint of neck pain was not caused by any accident that arose out of and in the course of her employment.

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant, a school custodian, alleges she sustained an injury to her neck, shoulder and arm on November 12, 2007 when she was removing a bar from a door. This was an unwitnessed accident, but claimant maintains that she told her school principal, Ms. Terry Lemos, about this accident that same day. And claimant testified that she told her supervisor, Gary Kunc, about the accident within a day or two. According to the claimant, she described the accident and her immediate onset of neck pain and a migraine headache. Both Terry Lemos and Gary Kunc deny claimant spoke to them on November 12, 2007 about any work-related accident and resulting injury.

The parties agreed that claimant continued to work for two days. Then on Friday, November 16, 2007, claimant says that she again talked to the principal about her neck complaints. Ms. Lemos confirms that she had a conversation with claimant early on Friday, November 16, 2007. When claimant arrived at work at approximately 6:45 a.m., she arrived with a heated rice pack on her neck. Both parties agree that Ms. Lemos inquired of her condition and claimant told her she was having neck and shoulder pain and needed to go to the doctor.

Later that morning claimant informed Ms. Lemos that she had a doctor's appointment over the noon hour. At some later point, Ms. Lemos advised claimant that she needed to go to another building and meet with the Human Resources manager, Tom Keil. Claimant went to this meeting as requested and was terminated, ostensibly for poor performance issues. During this meeting with Mr. Keil he noticed that claimant's neck was stiff. Claimant told him that she had a 12:30 p.m. doctor's appointment scheduled with her physician.

After her termination claimant went to the doctor's appointment and thereafter, respondent was contacted by the doctor. Respondent was advised that claimant was asserting an injury that occurred at work and respondent was asked to authorize further treatment. Respondent tentatively authorized treatment, predicated on the physician's conclusion that claimant required such treatment due to a work-related injury.

At some point treatment was halted and that decision led to claimant's request for preliminary hearing relief in order to continue her treatment and receive TTD benefits.

The ALJ concluded as follows:

1. This [c]ourt finds that the [c]laimant was injured out of and in the course of her employment with the [r]espondent on November 12, 2007. The [c]laimant made an appointment with the workers compensation doctor prior to learning she was terminated.¹

¹ ALJ Order (Jan. 10, 2008).

In their briefs to the Board, both parties agree that this case turns upon the credibility of the witnesses. If claimant is to be believed, she told at least 2 people that she suffered a work-related injury on November 12, 2007, the same day of her injury (or in the case of her supervisor, Gary Kunc, within the next day or two). And again on November 16, 2007, when she told Tom Keil of her work-related injury on that Monday.

If respondent's witnesses are to be believed, none of them were told of this accident as claimant alleges, although each of them concedes she exhibited a stiff neck and admitted she had a doctor's appointment over the noon hour on November 16, 2007. One witness, Gary Kunc, even testified that claimant had shoulder and neck complaints the week before her alleged injury. He further testified that during that conversation he asked if it happened at work and she denied any connection.

Distilled to its simplest terms, claimant either suffered an injury while at work, told her employer and was fired or claimant had an injury unrelated to work for which she was seeking treatment, and when fired, turned around and asserted that her neck and shoulder complaints were work-related.

The ALJ concluded that because claimant had already made a doctor's appointment with the physician that she *knew* was the authorized treating physician before she was terminated, her version of the events was more credible. This Board Member has considered this reasoning and disagrees, finding that the Preliminary Hearing Order should be reversed.

The ALJ relied on the fact that claimant made her doctor's appointment *before* she knew she was terminated. His theory apparently was that she was acting in a manner consistent with one who was injured rather than one who was intending on manufacturing a workers compensation claim in reaction to her termination, because as of the time she made the appointment, she had not yet learned of her employer's intention to fire her. And she made this appointment with the physician that she knew, from previous experience, was the designated treating physician. The flaw in this analysis, which this Board Member finds important, is that claimant's supervisor testified that she was complaining of neck and shoulder complaints *before* November 12, 2007. And according to Mr. Kunc she denied that these complaints were attributable to a work-related accident. Thus, her decision to seek treatment on November 16, 2007 from a physician for those complaints who had treated her before is not unexpected.

This Board member is mindful that in the past, the Board has indicated that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Often, the Board will note that the ALJ has the opportunity to personally observe the claimant and respondent's representatives testify in person and often some deference is given to the ALJ's findings and conclusions because he or she is able to judge the witnesses' credibility by personally observing them testify. Under these facts and circumstances, this Board Member acknowledges the ALJ's unique role in the preliminary

hearing process but nonetheless finds that the greater weight of the evidence establishes that claimant has failed to meet her evidentiary burden to establish that her claim arose out of and in the course of her employment. Thus, the ALJ's preliminary hearing Order is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.² Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated January 10, 2008, is reversed.

IT IS SO ORDERED.

Dated this _____ day of March 2008.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Thomas M. Warner, Jr., Attorney for Claimant
Thomas J. Walsh, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

² K.S.A. 44-534a.